1468

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD N. JEFFERS,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Do the Federal labor laws accord a union official protected status when called into a supervisor's office to respond to an arbitrator at a federal facility concerning a management initiated grievance, and then engaged in a discussion with the supervisor regarding official time to meet with that arbitrator.

2. When a terminated federal employee challenges the severity of the penalty, is it permissible for the MSPB to simply presume the the agency conscientiously considered the relevant factors and struck a responsible balance within tolerable limits of reasonableness, where the Agency fails to call the deciding official to evaluate his assessment of penalty, or present any evidence regarding consideration of the penalty assessing factors when rendering that decision of removal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Petitioner Richard N. Jeffers respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

REPORT OF THE OPINIONS BELOW

The unreported decision of the United States Court of Appeals for the Federal Circuit in Case No. 89-3314, is reproduced as Appendix A to this Petition. The denial of the petition for rehearing by the Federal Circuit panel is reproduced at Appendix B. The declination of the suggestion for rehearing en banc by the Federal Circuit is reproduced at Appendix C. The final opinion and order of the Merit Systems Protection Board (MSPB), in Dkt. No. AT07528810312 is reproduced at Appendix D. The initial decision of the MSPB is reproduced at Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 1989. A petition for rehearing was denied on January 5, 1990. A suggestion for rehearing en banc was denied on January 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 7101 provides in pertinent part:

Sec. 7101. Findings and purpose

"(a) The Congress finds that—

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards to public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment . . .

5 U.S.C. 7102 provides in pertinent part:

Sec. 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain

from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. 7114 provides in pertinent part:

Sec. 7114. Representation rights and duties

"(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

"(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

"(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

"(ii) the employee requests representation.

"(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

5 U.S.C. 7116 provides in pertinent part:

Sec. 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; . . .

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter . . .

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . .

"(8) to otherwise fail or refuse to comply with any provision of this chapter . . .

5 U.S.C. 7513 provides in pertinent part:

Sec. 7513. Cause and procedure

"(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

"(b) An employee against whom an action is proposed is entitled to—

"(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of im-

prisonment may be imposed, stating the specific reasons for the proposed action;

"(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

"(3) be represented by an attorney or other representative; and

"(4) a written decision and the specific reasons therefore at the earliest practicable date.

"(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

"(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title . . .

5 U.S.C. 7701 provides in pertinent part:

Sec. 7701. Appellate procedures

"(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

"(1) to a hearing for which a transcript will be kept; and

"(2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board.

"(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

"(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

"(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

"(B) in any other case, is supported by a preponderance of the evidence.

"(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

"(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

"(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

"(C) shows that the decision was not in accordance with law . . .

"(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

"(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(2) obtained without procedures required by law, rule, or regulation having been followed; or

"(3) unsupported by substantial evidence...

5 U.S.C. 7703 provides in pertinent part:

Sec. 7703. Judicial review of decision of the Merit Systems Protection Board

"(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision . . .

"(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91-

and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board . . .

STATEMENT OF THE CASE

Mr. Jeffers maintains that the Merit Systems Protection Board and the Federal Circuit critically erred in sustaining his removal from federal service by their holdings that he was not engaged in protected activity at the time of the incident underlying the removal, and by sustaining the penalty despite his employer's failure to present any competent evidence on this challenge.

Mr. Jeffers, a medical technologist, was issued a notice of proposed removal by his employer, the VA Medical Center in Birmingham, Alabama, alleging that on one occasion he was "rude, disrespectful, threatening, insolent and insubordinate" to his supervisor Linda Banker, Chief Technician. The notice alleged:

> Specifically, you repeatedly yelled at Ms. Banker after she asked you how much official time you needed; you defiantly jerked the telephone off her desk and pounded the keys; you glared at her in a threatening manner while leaning over her desk; at one point you coiled your arm and thrust it toward her, pointed at the official time log and screamed at her, "I'm not leaving this office until you document that the time was approved on the log." Despite attempts to calm you, you repeatedly yelled at Ms. Banker in an angry manner. She felt intimidated, threatened and was embarrassed by your tirade . . .

Mr. Jeffers responded in writing to the charges asserting, *inter alia*, that he did not speak above his normal tone of voice; did not defiantly jerk the phone or pound the keys; the phone was used with his supervisor's permission; he did not glare at her in a threatening manner, nor did he make any threatening gestures; that he pointed at the official time log and asked her to indicate on the log whether or not official time was approved as there had been frequent disagreements, and prior disciplines stemming from issues regarding maintenance of the official time log; that he followed all instructions given to him; that he was engaged in protected activity at the time of this incident; that the proposed action was in retaliation for his union activities; and that the penalty was unreasonable and unduly harsh.

The Birmingham VA medical Center Director, Hugh Vickerstaff, removed Mr. Jeffers from employment.

Mr. Jeffers timely appealed this decision to the Merit Systems Protection Board (MSPB) and a hearing was held. The MSPB presiding official [referred to alternatively herein as ALJ] affirmed the removal. A timely Petition for Review was filed by Mr. Jeffers to the MSPB. The MSPB "reopen[ed] the case on its own motion . . and affirm[ed] the initial decision as modified by [its] Opinion and Order, still sustaining the removal action."

Mr. Jeffers filed a petition for review to the United States Court of Appeals for the Federal Circuit. The statutory basis for jurisdiction of that court to entertain the appeal is 5 U.S.C. 7703. The Federal Circuit affirmed the decision of the MSPB without opinion, and declined

the Petition for Rehearing and Suggestion for Rehearing En Banc.

The facts as developed at the hearing were as follows:

At the time of his removal, Mr. Jeffers had been employed by the agency for 21 years. The morning of the incident at issue, Mr. Jeffers' 2nd line supervisor, Linda Banker received a telephone call from Bruce Reinhart, an agency Labor Relations Specialist. Mr. Reinhart told Ms. Banker that he was meeting in the conference room with an arbitrator and needed to speak to Mr. Jeffers. Mr. Reinhart gave Ms. Banker the conference room telephone number. Ms. Banker, through Mr. Jeffers 1st line supervisor Gwen Cephus, summoned Mr. Jeffers to her office. Ms. Banker told Mr. Jeffers that Mr. Reinhart called and that the arbitrator wanted to talk with Jeffers, and then gave Jeffers the telephone extension number. The arbitrator, Lloyd Byars, had arrived to hear or determine whether to hear a management initiated grievance, although confusion existed as to whether that arbitration was canceled or postponed. Mr. Jeffers was the officially designated union representative on that case.

Ms. Banker testified that when Mr. Jeffers arrived in her office she gave him the option to call the arbitrator or go there in person, (subject of course to approval for official time). Mr. Jeffers testified that Ms. Banker told him he was to call the arbitrator, and gave him the extension number. Mr. Jeffers took the phone sitting on Ms. Banker's desk, turned it toward him, and began dialing the keys to call the extension Ms. Banker had given him. Mr. Jeffers informed the arbitrator that he had been de-

nied official time for that entire day so he could not attend the arbitration.

Ms. Banker asked Mr. Jeffers "if he would mind transferring the phone call to another extension." Mr. Jeffers then informed the arbitrator that he was being asked to leave the office, and then immediately terminated the phone call.

After Mr. Jeffers hung up the phone, he told Ms. Banker he needed to go to the conference room to converse with the Arbitrator and Mr. Reinhart. Ms. Banker reached behind her for the official time log and asked Mr. Jeffers how much time he needed and the purpose for which he needed it. Mr. Jeffers asserted that he asked for 2 hours official time. Ms. Banker told Mr. Jeffers that she would fill in "not designated" on the official log. Ms. Banker indicated that she would record the time Mr. Jeffers used after he returned to her office to sign in. Mr. Jeffers pointed at the log and said he wanted the time approved and would not sign it unless Ms. Banker approved it. Ms. Banker insisted that she had approved the time, and would fill in the amount only upon Mr. Jeffers return from the meeting. Ms. Banker grabbed the log to her chest, and told Mr. Jeffers that it was management's log and she had filled it out as she had been instructed to do. Mr. Jeffers said he did not know whether leave was approved, but he then departed the office. Mr. Jeffers was subsequently fired because of this incident.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONSTITUTES A SIGNIFICANT DEPARTURE FROM THE SCOPE OF PROTECTED UNION ACTIVITIES BROADLY RECOGNIZED BY THIS COURT OR ALTERNATIVELY DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING PARAMETERS OF SUCH PROTECTION, WHICH SHOULD BE SETTLED BY THIS COURT.

The decision of the panel, if permitted to stand, would radically alter the statutorily prescribed and court applied precept of protected union activity. The federal labor laws have accorded union officials a certain leeway for impulsive behavior, in recognition that meetings with supervisors require a free and frank exchange of views and often arise form highly emotional and personal conflicts. For "bruised sensibilities may be the price exacted for industrial peace." *Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Bettcher Manufacturing Corp.*, 76 NLRB 526 (1948). No decision however, prior to this one, has stripped a union official, acting in that capacity, of his protected union status. Left to stand, the decision obliterates any analysis of whether an employee's activities exceed the scope of such protections, exposing huge numbers of employees to disciplinary action for the effective and forceful representation of the interests of that bargaining unit.

Mr. Jeffers was summoned by his supervisor, Ms. Banker, to leave his regular workplace and come to her office. Upon his arrival there, Mr. Jeffers was told that he

needed to speak to an arbitrator, who was present at the facility to hear or discuss the scheduling of a management initiated grievance regarding the designation of union stewards. Mr. Jeffers was the designated union representative on that case. Mr. Jeffers was given the arbitrator's extension number. Mr. Jeffers took the phone on Ms. Banker's desk, dialed the extension number he was given, and informed the arbitrator that he had been denied official time for that entire day so he could not attend the arbitration. There had previously been some disagreement as to the manner of scheduling that arbitration, obstacles placed in front of the union to present its case, and efforts to cancel or postpone it, testimony on this issue severely restricted by the MSPB. After a minute and a half, according to Ms. Banker, she asked Mr. Jeffers if he would mind transferring the phone call to another extension. Mr. Jeffers informed the arbitrator that he was being asked to leave the office, and then immediately terminated the phone call.

After Mr. Jeffers hung up the phone, he told Ms. Banker he needed to go to the conference room to converse with the arbitrator and the Labor Relations Specialist who had informed Ms. Banker of the arbitrator's desire to speak to Jeffers. Ms. Banker reached behind her for the official time log, which was a ledger utilized by management to document official time usage. She asked Mr. Jeffers how much time he needed and the purpose for which he needed it. Mr. Jeffers asserted that he asked for two hours official time; Ms. Banker declared that he did not know how much time was needed. Ms. Banker told Mr. Jeffers that she would fill in "not designated" on the pertinent section of the official log. She indicated that she

would record the time Mr. Jeffers used after he returned to her office to sign in. There was testimony, to the extent permitted by the ALJ, regarding prior unsupported, malevolent, and ultimately retracted charges of Jeffers' abuse of official time and AWOL, disputes as to interpretation of an official time arbitration award, and unilateral management scheduling and denial of Jeffers' official time to present this case. Under these circumstances, Mr. Jeffers pointed at the log and said he wanted the time approved, and would not sign the log unless Ms. Banker approved it. Ms. Banker insisted that she had approved the time, and would fill in the amount only upon Mr. Jeffers' return from the meeting. Ms. Banker grabbed the log to her chest, and told Mr. Jeffers that it was management's log. Mr. Jeffers said he did not know whether leave was approved, but he then departed the office. Mr. Jeffers returned about two hours later, was cordially received by Ms. Banker and the log completed. Mr. Jeffers was terminated from federal civilian service based upon this incident, following 21 years of fully satisfactory service.

The ALJ found that the "discussion Appellant had with his supervisor does not come under the category of a protected union activity." The full Board, in denying Mr. Jeffers' Petition for Review did not even consider this issue. The Federal Circuit panel following oral argument, affirmed without opinion. The Panel declined a Petition for Rehearing and the Court declined the Suggestion for Rehearing En Banc without further comment.

Although arising in a libel context, this Court in *Old Dominion, supra,* recognized that the primary source for union freedom of speech in the private sector were the guarantees embodied in Section 7 of the National Labor

Relations Act, addressing employee rights to form, join or assist labor organizations. The federal sector scheme analyzed in *Old Dominion* under the predecessor E.O. 11491, is now codified at 5 U.S.C. 7102. It provides that:

> each (federal) employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right . .
>
> (1) to act for labor organization in the capacity of a representative, and the right in that capacity to present the views of the labor organization to heads of agencies and other officials of executive branch of the Government, the Congress or other appropriate authorities and
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees through this chapter.

This source for the protection for union freedom of speech, has repeatedly been used by the courts and administrative agencies to define whether an employee is entitled to the broader protections against disciplinary action when acting within their union capacities. These cases have all stood for the general proposition that employees may not be disciplined for rude or impertinent conduct in the course of their labor activities; but that their conduct exceeds the protective orbit of the federal labor laws and thus subjects them to discipline only if it constitutes fla-

grant misconduct, i.e., gross insubordination or threats of physical harm."[1]

The ALJ's finding that Mr. Jeffers conduct did not even qualify him for protected status, precluded any fur-

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[1] See for example: *NLRB v. Thor Power Tool Co.*, 351 F. 2d 584 (7th Cir. 1965); (referring to a manager as a "horse's ass" while leaving his office was not flagrant misconduct when considered in the context of a heated grievance discussion at which the manager's voice got louder in tone); *Crown Central Petroleum Corp v. NLRB*, 430 F.2d 724 (5th Cir. 1970) (not flagrant misconduct where the employee asserted that the supervisor's statements were "damn lies"); *NLRB v. Fla. Medical Center, Inc.* 576 F.2d 666 (5th Cir. 1978) (not flagrant misconduct where employee referred to hospital administrator as a mafia director during the course of a counseling session); *U.S. Postal Service v. NLRB*, 652 F.2d 409 (5th Cir. 1981) (warning letters for insubordination to two employees based in part on their refusal to obey supervisor's order to return to work at the conclusion of an informal grievance meeting, but who instead followed supervisors onto workroom floor, continued to argue loudly and returned to work only after supervisor issued second order, were not engaged in flagrant misconduct). *Farris v. U.S. Postal Service*, 14 MSPR 568 (1983) (conduct occurring during a grievance session was found to be within the ambit of protected activity, although the particular derisive remarks and physical behavior were found to constitute gross insubordination, thereby exceeding the scope of protection); *Kennedy v. Dept. of Army*, 22 MSPR 190 (1984) (allegedly flase statements against a supervisor in conjunction with a grievance he filed, alleging that supervisors were guilty of "cupidity or ignorance," "illegal use of resources" and "personal retaliation and prejudice" were found to be privileged statements which could not form the basis for disciplinary action); *VA Regional Office Denver, Colorado*, 2 FLRA 667 (1980) (union president's description of personnel officer's actions in a grievance as "malevolent" and the officer as "incompetent" held to be traditional collective bargaining language). *Dept. of Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 2 FLRA 54 (1978) (steward shook his fist in supervisor's face and remarked in part that I am going to get your ass. I filed a ULP and if the Council doesn't get your job, then something is wrong," were held to be related to foreman's pervasive course of conduct in interfering with protected rights, and were themselves protected).

ther consideration of whether Mr. Jeffers' particular conduct, under the entire circumstances, was within the scope of the afforded protections. In fact, this conclusion by the ALJ, which became the law of this case without any further discussion by the Board or the Federal Circuit, was arrived at prior to Mr. Jeffers' opening statement or any presentation of evidence whatsoever on this issue.[2]

This Court in *Old Dominion, supra,* has declared that the "same federal policies favoring uninhibited, robust and wide-open debate in labor disputes (as applies to the NLRA) are applicable in the federal sector." This Court stated further that "federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." 418 U.S. at 285. These principles, as derived from the federal labor laws, have been found to have similar application and significance when related to protected activities by union officials acting in that capacity.[3]

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[2] This predetermination by the ALJ, not only deprived Mr. Jeffers of a meaningful consideration of this issue, but was used to govern the ALJ's refusal to permit testimony further explaining his role in this matter i.e. circumstances leading up to the presence of the arbitrator, and alleged deceptive management practices in scheduling the matter for a hearing.

[3] The VA herein, has continually mischaracterized Mr. Jeffers' position to the Board and the Federal Circuit, as asserting that protected union status means immunity from disciplinary action. Mr. Jeffers has repeatedly asserted that his engagement in protected activities simply dictates a responsible evaluation of the nature of his alleged imprudence in light of the actions and provocation of management, against the employer's need to maintain order in its operation. Such an evalu-

In a similar context, this Court referenced Section 7 of the NLRA and Section 1 of the E.O. (now codified at 5 U.S.C. 7102) to dispose of the employer's suggestion in *Old Dominion* that no "labor dispute" is presented on the facts, thereby rendering activity outside its protective domain. This Court decided that whether preemption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute," but "whether the defamatory publication is made in a *context* where the *policies of the federal labor laws leading to protection of freedom of speech are significantly implicated.*" (emphasis added), 418 U.S. at 279.

Whether the analysis concerns preemption for state libel laws, or disciplinary actions against union officials assisting labor organizations, the methodology of applying these federal labor laws protecting employee freedoms is identical. It does not depend upon abstract notions of what an employee says or how the employer construes these statements, but whether the federal labor laws leading to their protection are significantly implicated.

Application of the principles of this Statute, dictates a finding that Mr. Jeffers was engaged in protected activity during his meeting with Ms. Banker. When called to his Supervisor's office, Mr. Jeffers was acting solely and exclusively in the capacity of a recognized designated union official representing the interest of the union in connection with a grievance proceeding initiated by manage-

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ation never occurred in this case because of the ALJ's threshold finding that Mr. Jeffers was not engaged in protected activity.

ment. Indeed it was management's action that resulted in Mr. Jeffers' assuming his union "hat" in the meeting to resolve the issue of scheduling and/or presenting the union's position in this arbitration case, concerning designation of union stewards. Mr. Jeffers seeking of official time to meet with the arbitrator was incidental to and necessary to fulfilling his role of union representative in responding to this management grievance, and was required by the labor management contract and arbitration award. Jeffers was there to make sure that the union did not default in an arbitration and to present the union's views on the scheduling, and if necessary, the merits of that management initiated grievance, affecting that entire collective bargaining unit.

If this court determines that the decision of the Federal Circuit affirming that Mr. Jeffers was not engaged in protected activity is not contrary to the spirit, and indeed the letter, of this Court's decision in *Old Dominion*, Petitioner respectfully maintains that this appeal requires an answer to this precedent setting question of exceptional importance.

No published decision of this court has directly addressed this issue. However, as set forth *infra*, the courts and administrative agencies considering this issue have uniformly recognized that the dispositive issue in determining whether protected union status attaches, is the capacity within which an employee is acting when meeting with management. The government offered not a scintilla of authority for its oft-repeated contention before the Federal Circuit that there must be the utterance of the word "grievance" or actual collective bargaining to impart the cloak of protected activity. This position is not only a

gross perversion of this statutory protection, but irreparably trivializes the significance of a union official's activities, and the history of protections afforded these individuals against arbitrary management actions. The Federal Circuit by rendering a decision without an opinion offered no reasoning for departure from the precedent of other circuits.

The courts and the Federal Labor Relations Authority [FLRA] [federal sector counterpart to NLRB] have made it absolutely clear that "if an employee is engaging in concerted activities for the purpose of mutual aid and protection, the imposition of a disciplinary sanction for insubordination may violate the [federal labor laws] whether or not the employer has exhibited union *animus*." *Crown Central Petroleum Corp., supra; NLRB v. Fla. Medical Center, Inc., supra.* As long as the activities engaged in are lawful and the character of the conduct is not indefensible in its context, employees are protected by Section 7 of the Act. The Federal Circuit's opinion is in conflict with these other circuits.

While many of the cases in other circuits and before the FLRA arise in the context of actual grievance sessions, many do not, and none have recognized so narrow a requirement. However, there can be no dispute that while Mr. Jeffers was not actually presenting the grievance, he was acting in a union capacity to advance the position of the union regarding that specific grievance, and to assure his presence before the arbitrator to present that grievance. Mr. Jeffers was engaging in concerted activities for the purpose of mutual aid and protection of the bargaining unit on this management initiated grievance.

The cases routinely recognize that similar activities of union officials enjoy a protected status.[4]

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[4] The Fifth Circuit in *U.S. Postal Service v. NLRB, supra* recognized that such protection indeed extends beyond the period of a grievance meeting, and covers an employee's continued pursuit of its supervisors to the workplace, even after the supervisors had terminated that discussion. The Fifth Circuit in *NLRB v. Florida Medical Center, Inc., supra* found that an employee called into a counseling session by two supervisors for allegedly poor attitude was engaged in protected activity when she referred to the chief administrative officer of the facility as a "mafia director." The court stated clearly that "although [the employee's] position was not so clear-cut as that of an individual participating in a recognized grievance procedure or actively soliciting for the union, we think that under the circumstances of this case the hospital cannot argue that she was not protected."

Again, although it is clear that Mr. Jeffers was acting as a union official in connection with a grievance proceeding, the Federal Labor Relations Authority has repeatedly found that such protection is not confined to actual participation in, or connection with grievance proceedings. In *Dept. of Treasury, IRS, Memphis Service Center*, 16 FLRA 687 (1984), the FLRA rejected the Agency's contention that the union steward was not acting in her capacity as a steward when she called the supervisor a fool. The Agency asserted that the steward was at the supervisor's desk simply to ask for "bank time" and bank time is used only for conferring with employees, not with management. The FLRA found that the steward was at the desk both to secure "bank time" and to discuss the matter with the supervisor. The FLRA declared "but regardless of how the steward happened to designate her time usage, she was acting in her capacity as a union steward when the remark was made; and this is what controls whether the action was a protected one under the statute." 16 FLRA 696. The steward's representation there was not in the context of a particular grievance, but simply in response to an employee's request to have a representative accompany her to meet with a supervisor regarding an alleged AWOL. In *HUD, San Antonio Area Office*, 13 FLRA 38 (1983) the FLRA found that an employee was in a protected union status when a union steward protested a supervisor's change in past practice on a matter of personal concern to a higher management official. Responding to the Agency's argument that the employee was not acting solely as a union representative, but commingled his personal concern for a change in past practice with a

Neither the MSPB, nor the government, offered a single case contrary to or questioning this line of authority. Relying on the protected status accorded by the statute and this uniform line of authority, union officials attend these sessions with management properly believing that they may engage in robust debate to present their positions. Permitting this MSPB ruling to stand without comment by the Federal Circuit, will in effect serve to revoke the protections of the federal service labor management relations statute, repudiate the holdings of every court and agency considering the scope of this issue, and render union officials totally powerless to defend the whim or vengeance of defiant managers, weary of dealing with these union officials.

The MSPB and Federal Circuit's ruling that Mr. Jeffers was not even subject to the federal laws protecting union activities, precluded a consideration of whether his

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representational issue, the FLRA found that stewards are often affected by the issues they express opinions on, and this does not serve to strip them of statutory protection when performing representational duties. In *Dept. of Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 2 FLRA 53 (1979), the FLRA found that the steward's protected actions of shaking his fist in the supervisor's face coupled with the statement "I am going to get your ass" were made in the context of frustration at being thwarted by the supervisor in an effort to interview an employee regarding a grievance. In *Department of Army, Hq. Military Traffic Command*, 2 FLRA 539 (1980) statements by a union member of a rating panel that loudly accused management members of being "indoctrinated by management" were found to be protected activity. In *Defense Prop. Disposal Region, Ogden, Utah and Leighton Leavitt*, 24 FLRA 66 (1986) the FLRA found that taking photographs of a suspected contract violation is a protected activity.

alleged misconduct was so excessive or grossly insubordinate as to exceed the protective orbit of those laws.[5]

II. THE FEDERAL CIRCUIT'S DECISION UNLAWFULLY RELIEVES THE AGENCY OF ITS ULTIMATE BURDEN OF ESTABLISHING THE APPROPRIATENESS OF THE PENALTY.

It is maintained that the Federal Circuit's affirmance of the MSPB's treatment of Mr. Jeffers' challenge to the

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[5] Mr. Jeffers, in briefs to the MSPB and Federal Circuit, exhaustively addressed the circumstances that could not reasonably result in a finding of gross insubordination, and recited a plethora of cases where similar or more egregious conduct was found to be within the scope of the protection. The place of the discussion was the confines of Ms. Banker's office, "a sanctuary where it could reasonably be expected that a full, free and frank exchange of views would be shared among equals." *Crown Central Petroleum Corp., supra.* The subject matter of the discussion concerned a management grievance and official time to meet with the arbitrator whose appearance was unexpected, based on previous discussions questioning his appearance. Mr. Jeffers was caught between justifying the union's position on this matter without incurring sanctions or additional expenses, and a justifiable concern about his own personal welfare, based on management's previous impositions and threats of discipline for alleged and often frivolous assertions of abuse of official time. Mr. Jeffers' remarks were pertinent to a discussion of the grievance under question. He did not make any threats, indecent, rude or personal attacks on his supervisor. Mr. Jeffers' briefs went into exhaustive detail that even if he was found not to be engaged in protected activity, his conduct could not be considered insubordinate as charged, as he never refused to obey a supervisor's order. Moreover, the Agency never presented a case on a charge of threatening behavior, although this was the predominant charge in the removal letter. The ALJ found this not to be a part of the Agency's case, and the ALJ refused to consider any evidence whether a reasonable person would have considered his actions as threatening, i.e. refused evidence on supervisor's sensibilities, supervisor's apprehension of harm, etc. The ALJ found this charge subsumed under the insubordination charge, and thereby sustained the removal.

appropriateness of the penalty, is contrary to the precedent it consistently set forth in *Connolly v. U.S. Dept. of Justice*, 766 F.2d 507 (Fed. Cir. 1985); *Mitchum v. TVA*, 756 F.2d 82 (Fed. Cir. 1985); *Miguel v. Dept. of Army*, 727 F.2d 1081 (Fed. Cir. 1984); *Van Fossen v. HUD*, 748 F.2d 1579 (Fed. Cir. 1984); *Kline v. Dept. of Transportation*, 808 F.2d 431 (Fed. Cir. 1986) and *Parker v. U.S. Postal Service*, 819 F.2d 1113 (Fed. Cir. 1987). Again, the MSPB entertained no independent consideration of the ALJ's ruling on this issue. Moreover, the MSPB and the Federal Circuit's decision is in conflict with the standard established for reviewing Agency decisions and sanctions, established by this Court in *Citizens to Protect Overton Park, Inc.*, 401 U.S. 402 (1970); *Bowman Transportation, Inc. v. Arkansas Best Freight Systems, Inc.*, 419 U.S. 281 (1974); and *Steadman v. SEC*, 450 U.S. 91 (1981).

The Federal Circuit, in its previous aforecited decisions, has repeatedly adopted application of the MSPB's model for analyzing the appropriateness of an agency imposed penalty, set forth in *Douglas v. Veterans Administration*, 5 MSPR 280 (1981). The MSPB's review of that penalty is essentially "to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness," citing this court's decision in *Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402 (1971). The ultimate burden is upon the Agency to persuade the MSPB of the appropriateness of the penalty imposed. The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion. *Douglas* set forth 12 non-exhaustive factors relevant for consideration in determining the appropriate-

ness of the penalty. The presiding official is required to ascertain whether the Agency has responsibly balanced the relevant factors in the individual case and selected a penalty within the tolerable limits of reasonableness. *Kline v. Dept. of Transportation, supra; Mitchum v. TVA, supra.* Mr. Jeffers, throughout these proceedings, challenged the severity of the penalty. The Agency put on absolutely no evidence of what factors if any, it actually considered in arriving at its decision to remove Mr. Jeffers. The Agency did not call the deciding official in this case, Director Vickerstaff, nor any witness who obstensibly assisted him in preparing that decision. The presiding official, in responding to Mr. Jeffers' arguments regarding severity of penalty, incredibly focuses on the "recommendation" of the proposing official, Dr. Alexander to remove Appellant, when the presiding official clearly acknowledged at the hearing that the incisive witness on the issue of penalty is the deciding official. It is the deciding official, quite obviously, and not the proposing official who must independently consider relevant factors in assessing penalty. It is only the deciding official, who after consideration of the written or oral reply, can properly assess penalty. To rely on the assessment, as did the ALJ, of the official who issues the notice of proposed removal, would deprive this statutorily mandated reply of any significance whatsoever, thereby rendering the proposed action a foregone conclusion. It is impossible on the record in this case for the MSPB or the Federal Circuit to determine that the "agency did conscientiously consider the relevant factors and did strike a re-

sponsible balance within tolerable limits of reasonableness."[6]

With respect to mitigating circumstances, the ALJ merely commented that the official who issued the notice of proposed removal "could see no mitigating circumstances in this case."[7] This statement not only evinces the ALJ's misconception of the relevant witness on this issue, but it totally distorts the record in this case. Contrary to this assertion, that proposing official, conceded that he did not even consider mitigating circumstances, because he alleged that Mr. Jeffers furnished him no immediate response to this incident. The ALJ interrupted this questioning and declared that "whether [the proposing official] looked for mitigating circumstances doesn't matter because there is no such requirement." In fact, Mr. Jeffers presented these mitigating circumstances to the deciding official in his written reply. Failure to consider a signifi-

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[6] Moreover, the decision letter did not state even one factor or consideration used by that deciding official in arriving at this decision. "Aggravating factors on which the Agency intends to rely for imposition of an enhanced penalty, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official, and the decision *notice should explain what weight was given* to those factors in reaching the agency's final decision." *Douglas, supra* (emphasis added).

[7] Mr. Jeffers presented evidence, regarding tensions at work and harassment occasioned by disputes as to application of official time awards and erroneous charges of abuse of official time; reassignment of the Local President out of the bargaining unit; provocation by this supervisor by denying official time the previous day; filling out the log in a manner contrary to practice of all other supervisors; and bad faith in scheduling this arbitration.

cant mitigating circumstance constitutes an abuse of discretion. *Van Fossen, supra; Miguel, supra.*

By the Agency's presentation, the presiding official simply did not and could not identify or balance the relevant Douglas factors gleaned from this Court's aforecited decision in evaluating appropriateness of the penalty. There is no reference to Mr. Jeffers 21 year length of service, exemplary work record, performance on the job, the circumstances of these offenses, lack of notoriety of offense, inconsistency with similar offenses, and a host of other relevant considerations which would result in a finding that the agency imposed penalty is clearly excessive, arbitrary, capricious and unreasonable.[8]

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[8] The ALJ relied solely on 2 prior disciplinary charges against Mr. Jeffers, that reliance based on the testimony of the proposing official. Mr. Jeffers in a Motion in Limine, maintained that the first of those disciplinary charges, an October 1987 reprimand for insubordination, was the very same incident wherein he was charged 1 hour AWOL for leaving the lab on union business and returning an hour later. Mr. Jeffers filed an unfair labor practice charge asserting that he was properly authorized to use official time, and this retroactive denial of official time was an effort to restrain his lawful exercise of union activities. A settlement agreement was entered into wherein the Agency withdrew the charge of AWOL, and paid Jeffers for time as official time. Mr. Jeffers argued that the withdrawal of the AWOL removed the predicate for the reprimand, as there could be no deliberate insubordination when the entire basis of that insubordination charge was leaving the laboratory without permission, for which the Agency recognized he had obtained that official time approval. With respect to the second disciplinary charge, a 14 day suspension in January 1988, for alleged AWOL for 30 minutes while on union activities, insubordination, and delay in carrying out instructions, it was the subject of a pending arbitration at the time of the removal hearing. FPM 752, Sub. 3-3e(3) provides that "only if he had been given the entitlement to a (de novo) review of the prior disciplinary actions i.e. due process, [may the] agency properly consider the prior actions in setting the appropri-

CONCLUSION

Permitting the Federal Circuit's affirmance of the MSPB decision to stand will have the effect of chilling the exercise of lawful robust debate by union officials engaged in protected activities. As significantly, it would irreparably damage the ability of labor organizations to recruit and retain effective employee representatives, who can no longer rely on any protections when acting in their union capacities. This would have a deleterious effect on the public interest, as the Civil Service Reform Act, at 5 U.S.C. 7101, clearly provides that the right of employees to participate through labor organizations safeguards the public interest, and contributes to the effective conduct of public business. See *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89 (1983); *Cornelius v. Nutt*, 105 S. Ct. 2882 (1985). Moreover, permitting the MSPB's decision to stand, based on their cursory review of the penalty, respectfully makes a mockery of the reviewing function entrusted to an independent agency such as MSPB. For the aforesaid reasons it is re-

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ate remedy." The ALJ, mischaracterizing Mr. Jeffers' Motion as a request "to disregard [his] prior record," indicated she would merely "review that record to determine whether on its face, the prior discipline was clearly erroneous." The ALJ thus limited her review solely to the Agency developed record on this issue, denying any presentation of evidence whatsoever by Mr. Jeffers on these pending challenged disciplines. MSPB's limited review is wholly inadequate and invites the abuse of compounding specious disciplinary actions which are still being challenged.

spectfully requested that a writ of certiorari be issued in this matter.

Respectfully submitted,

RICHARD N. JEFFERS
(Pro Se)

3405 Avalon Road
Homewood, Alabama 35209
(205) 871-9221

APPENDICES

Appendix A

Decision of the
United States Court of Appeals
for the Federal Circuit
Case No. 89-3314

Note: This judgment is not accompanied by an opinion prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE

FEDERAL CIRCUIT

89-3314

RICHARD W. [sic] JEFFERS, PETITIONER

v.

VETERANS ADMINISTRATION, RESPONDENT.

Judgment

On Appeal from the Merit Systems Protection Board in Case No(s). AT07528810312

This Cause having been considered, it is Ordered and Adjudged:

Per Curiam: (BISSELL and MAYER, *Circuit Judges*, NORGLE, *District Judge*)*:

AFFIRMED. *See* Fed. Cir. R. 36.

Entered By Order of the Court

Dated December 8, 1989
/s/ Francis X. Gindhart, Clerk

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* Charles R. Norgle, Sr., District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

Appendix B

Denial of the
Petition for Rehearing by the
Federal Circuit Panel

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

89-3314

RICHARD W. [sic] JEFFERS,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

ORDER

Before BISSELL, Circuit Judge, MAYER, Circuit Judge, and NORGLE, District Judge.*

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

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* Charles R. Norgle, Sr., District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on January 12, 1990.

FOR THE COURT
/s/ Francis X. Gindhart
Clerk

Dated: January 5, 1990

CC: STUART A. KIRSCH
STEPHEN J. MCHALE
JEFFERS V VA, 89-3314
(MSPB - AT07528810312)

Note: This order has not been prepared for publication in a reporter.

Appendix C

Declination of the
Suggestion for Rehearing En Banc by the
Federal Circuit

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3314

RICHARD W. [sic] JEFFERS,

Petitioner,

v.

VETERANS ADMINISTRATION,

Respondent.

ORDER

A suggestion for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, declined.

FOR THE COURT,
/s/ Francis X. Gindhart
Clerk

Dated: January 18, 1990

CC: STUART A. KIRSCH

STEPHEN J. MCHALE
JEFFERS V VA, 89-3314

(MSPB AT07528810312)

Note: This order has not been prepared for publication in a reporter.

Appendix D

Final Opinion and Order of the
Merit Systems Protection Board
Dkt. No. AT07528810312

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD N. JEFFERS,

Appellant,

v.

VETERANS ADMINISTRATION,

Agency,

DOCKET NUMBER
AT07528810312

Date: May 4, 1989

Stuart A. Kirsch, Esquire, College Park, Georgia, for the appellant.

C.V. Stelzenmuller, Esquire, Burr and Forman, Birmingham, Alabama, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the July 15, 1988 initial decision, sustaining the agency action removing the appellant from his position. For the reasons discussed in this Opinion and Order, the Board DENIES the petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the removal action.

BACKGROUND

The agency removed the appellant from his position as Medical Technologist based on a charge of exhibiting "rude, disrespectful, threatening, insolent, and insubordinate" behavior towards his second-level supervisor, Linda Banker, on February 2, 1988. See Appeal File, Tab 9 (Agency File, Tab 13-A). The incident occurred when the supervisor called the appellant into her office both to relay a message to him that the arbitrator in a union matter in which he was involved requested to see him, and to ask him how much official time he needed for the union activity. In the notice proposing the appellant's removal, the agency alleged, *see id.*, that the appellant behaved in the following manner during this incident:

> Specifically, you repeatedly yelled at Ms. Banker after she asked you how much official time you needed; you defiantly jerked the telephone off her desk and pounded the keys; you glared at her in a threatening manner while leaning over her desk; at one point you coiled your arm and thrust it toward her, pointed at the Official Time

> Log and screamed at her, 'I'm not leaving this office until you document that the time was approved on the log.' Despite attempts to calm you, you repeatedly yelled at Ms. Banker in an angry manner. She felt intimidated, threatened and was embarrassed by your tirade in front of her subordinate, Ms. Gwen Cephus [the appellant's first-level supervisor].

In imposing the penalty of removal, the agency considered the appellant's past disciplinary record, which included a reprimand in October 1987 for insubordination, and a fourteen-day suspension in January 1988 for absence without leave (AWOL), insubordination, and unreasonable delay in carrying out instructions.

On appeal to the Atlanta Regional Office, the appellant: (1) Denied that his conduct was insubordinate, alleging that he did not grab the telephone in a violent manner and was not loud; (2) argued that the agency did not prove under *Metz v. Department of the Treasury*, 780 F.2d 1001, 1004 (Fed. Cir. 1986), that he made a threat against Ms. Banker, causing her to fear bodily harm; (3) contended that, in any event, his conduct was a protected activity (union matter), and he could not be disciplined for it; (4) contended that the agency action was taken in reprisal for his union activities; (5) asserted disparate treatment because of his union activities; and (6) challenged the appropriateness of the penalty of removal, including the agency's condiseration of the two prior disciplinary actions againist him.

The administrative judge found that: (1) The misconduct occurred as charged, crediting the testimony of the two supervisors, who witnessed the incident, and

another employee, Diane Cooper, who stated that she heard the appellant and entered the office immediately after he left, over the testimony of the appellant and two of his witnesses;[1] (2) the agency was not required to prove that the appellant's actions constituted a threat under *Metz* because the description of the appellant's conduct as "threatening" was used with other adjectives describing his conduct and was subsumed in the insubordination charge; (3) all of the appellant's actions in his supervisor's office (refusing to answer her questions, grabbing her telephone, thrusting a coiled arm towards her, refusing to leave her office as she had requested, and speaking in a loud, confrontational manner) constituted insubordination; (4) the appellant's conduct was not protected as union activity under *Romero v. Department of the Army*, 10 M.S.P.R. 56, 59 (1982), *aff'd*, 708 F.2d 1561 (10th Cir. 1983), or other authorities because it occurred, not in the context of a specific grievance, but in merely seeking official union time;[2] (5) the appellant did not establish

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[1] In making these findings, the administrative judge relied on the relevant criteria for evaluating a witness' credibility as set forth in *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-61 (1987).

[2] The adminstrative judge noted that, in a case the appellant relied upon, *Department of the Treasury IRS, Memphis Center*, 16 FLRA 691 (1984), the administrative law judge found that the employee's conduct in her supervisor's office was protected because the employee was there, not only to seek official union time, but also to discuss her client's problem. She also noted that, in all of the other FLRA decisions, the conduct found to be protected occurred in a specific grievance meeting in relation to an official grievance. She found that there was no indication here that the supervisor knew about the grievance; she was simply relaying a message to the appellant to meet with the arbitrator, who had requested to see him.

reprisal because, although he showed that he had engaged in a protected activity (union work), that he was subjected to an adverse action, and that both the proposing and the deciding officials knew of his protected activity, he failed to show a causal connection between the protected activity and the removal because he did not show that retaliatory motive was a significant factor in the taking of the adverse action;[3] and (6) removal was a reasonable penalty because the agency properly considered the appellant's prior disciplinary record, which she found met the criteria set out in *Bolling v. Department of the Air Force*, 9

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[3] The administrative judge analyzed the reprisal allegations under, inter alia, *Ireland v. Department of Health and Human Services*, 34 M.S.P.R. 614-19 (1987), which relies, in part, on the Federal Circuit's decision in *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986) (in order for an appellant to prevail on a contention of illegal retailation, he has the burden of showing that: (1) A protected disclosure was made; (2) the accused official knew of the disclosure; (3) the adverse action under review could, under the circumstances, have been retaliation; and (4) there was a genuine nexus between the alleged retaliation and the adverse action).

The administrative judge also considered the appellant's assertions that: He was treated differently from other employees who engaged in similar conduct; Ms. Banker deliberately drew him into her office to cause a confrontation; there was animosity between the agency and the union in relation to the interpretation of an arbitrator's decision on the use of official union time; the agency hired private counsel to represent it in this case; and the agency did not obtain a statement from the arbitrator to whom appellant was speaking on the telephone in Ms. Banker's office. She found that most of these arguments were frivolous and that none of them established a retaliatory motive. As for the appellant's allegation of disparate treatment, she noted that he was the only employee who had committed a third offense of insubordination and that the fact that the appellant had been a union official for more than ten years of his twenty years of service indicated that his involvement in union activities was not a factor in the agency's taking of the instant action. Initial Decision at 20.

M.S.P.R. 335, 339-40(1981) (the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous where the employee was informed of the action in writing, he was given an opportunity to dispute it to a different authority, and it was made a matter of record).[4]

The appellant has filed a lengthy petition for review challenging virtually every ruling, as well as virtually every factual and credibility determination made by the administrative judge. In doing so, he contends that: (1) The agency failed to support its charge; (2) the administrative judge erred engaged in in finding that he was not engaged in protected union activity at the time of the incident; (3) the administrative judge erred in finding that he failed to establish reprisal; and (4) the penalty of removal was unreasonable.

ANALYSIS

With respect to the appellant's challenges of the administrative judge's factual and credibility determinations on the above issues, we find that the appellant has generally expressed mere disagreement with the administrative judge's determinations, rearguing the facts. A review of

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[4] The administrative judge found that, although the appellant asserted that the prior reprimand he received initially for insubordination and AWOL was settled, the agency did not withdraw the insubordination charge. It merely paid the appellant for the one-day AWOL in exchange for his withdrawal of an unfair labor practice claim. She also found that, even though the appellant alleged that the fourteen-day suspension was awaiting arbitration, under *Ballew v. Department of the Army*, 36 M.S.P.R. 400, 403 (1988), and *Hubbard v. United States Postal Service*, 32 M.S.P.R. 505, 508 (1987), an agency may rely on a prior disciplinary action even if it is being appealed.

the initial decision shows that the administrative judge properly evaluated the evidence in accordance with the standards set forth in *Hillen*, 35 M.S.P.R. at 458 (to resolve credibility issues, an administrative judge must, in the following order: identify the factual questions in dispute, summarize the evidence on each disputed question of fact, state which version he or she believes, and explain in detail why the chosen version was more credible than the other version or versions of the events). *See* Initial Decision at 7-11. *See also Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board, and the Board must give due deference to the credibility findings of the administrative judge), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (per curiam).[5]

In challenging the administrative judge's rulings on the submission of evidence and the conduct of the proceedings, the appellant contends that the administrative judge erred in: permitting the agency to have "two technical advisers" and allowing one of them to testify and

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[5] The appellant contends, among other things, that the administrative judge erred in finding that his supervisor twice asked him to leave her office before he did so, because the supervisor's first request that he use another telephone was not a direct order to leave. He asserts that he left his supervisor's office after she asked him to do so. Even if we were to accept this interpretation proposed by the appellant, the appellant's remaining actions (i.e., refusing to answer his supervisor's questions, grabbing her telephone, thrusting his arm towards her, and speaking in a loud confrontational voice) were sufficient to constitute insubordinate behavior.

then to consult and confer with the agency's counsel and witnesses; denying his request for Margaret Lowe as a witness to testify regarding the message he received from his secondlevel supervisor and her observations, since, he asserts, she was within earshot of the supervisor's office; limiting testimony regarding Ms. Banker's conduct and demeanor in other meetings, which he asserts would show her confrontational and provocative state of mind as it related to mitigation of the penalty; not allowing questioning as to Ms. Banker's sensibilities in regard to the agency's allegation that his conduct was threatening and his assertion that his conduct was protected union activity; refusing to allow testimony which would establish the appellant's previous difficulties with the agency regarding the scheduling of arbitration meetings and which, he further asserts, was relevant to the issue of protected union activity; ruling, without allowing the presentation of evidence by the parties, that her research indicated that, in cases where union activity was found to be protected, there was negotiation or arbitration in process; allowing rebuttal testimony from a witness, after ruling that she would allow such testimony only in exceptional circumstances, and then limiting the appellant's response only to a statement from one witness; limiting examination of the proposing official on the issue of whether the agency conducted thorough investigation of the misconduct charged; and granting the agency's motion for an extension of time to serve requests for depositions without giving the appellant an opportunity to respond.

We have considered each of the above contentions made by the appellant. Even assuming that the adminis-

trative judge erred in any of the above rulings, the appellant has not shown how his rights were prejudiced thereby. While the appellant has, in many instances above, identified the evidence he asserts that the administrative judge's rulings precluded him from presenting, he has not shown that any of those rulings precluded him from presenting material evidence, i.e., evidence that was of sufficient weight to warrant an outcome different from that of the initial decision. *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980). Therefore, he has shown no basis on which the Board should reverse those rulings. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

ORDER

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

Appendix E

Initial Decision of the
Merit Systems Protection Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

RICHARD N. JEFFERS,

Appellant,

v.

VETERANS ADMINISTRATION,

Agency.

DOCKET NUMBER AT07528810312

Date: JUL 15, 1988

Stuart A. Kirsch, Esquire, American Federation of Government Employees, Atlanta, Georgia, for the appellant.

C. V. Stelzenmuller, Esquire, Birmingham, Alabama, for the agency.

BEFORE

MARGARET S. CUNNINGHAM
Administrative Judge

INITIAL DECISION
INTRODUCTION AND JURISDICTION

Appellant timely appealed to the Board's Atlanta Regional Office from a decision by the agency to remove him from the position he held as Medical Technologist, GS-09, Veterans Administration, Birmingham, Alabama. The removal, which became effective on March 18, 1988, was based on a charge of rude, disrespectful, threatening, insolent, and insubordinate conduct toward a supervisor. A hearing was held in Birmingham, Alabama, on June 2, 1988.

The Board has jurisdiction over this appeal under 5 U.S.C. §§ 7511(a)(1)(A), 7513 (d), and 7701. For the reasons below, the agency's action is AFFIRMED.

BURDENS OF PROOF

An agency must establish three things when it takes an adverse action against an employee. It must prove, by a preponderance of the evidence, that the charged conduct occurred. 5 U.S.C. § 7701(c)(1)(B). It must establish the existence of a nexus between the conduct and the efficiency of the service. 5 U.S.C. § 7513(a); *Hayes v. Department of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984). Finally, it must demonstrate that the penalty imposed was reasonable. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 307-08 (1981).

Because this case involves on-duty conduct, nexus is readily evidenced and that element need not be further addressed. *Blackford v. Department of the Navy*, 8 M.S.P.R. 712, 714 (1981).

The burden of proof with respect to any affirmative defenses rests with an appellant and must be proven by a preponderance of the evidence. 5 U.S.C. § 7701(c)(2)(A)-(C); *Spiegel v. Department of the Army*, 6 M.S.P.R. 31, 33 (1981). Thus, appellant has the burden of proving his claim that the adverse action was motivated by reprisal for his union activities, a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). *Bodinus v. Department of the Treasury*, 7 M.S.P.R. 536, 540-42 (1981).

ANALYSIS AND FINDINGS

The Agency Proved That Appellant Engaged In The Conduct Described In The Advance Notice

At the time of his removal, appellant had been employed by the agency for 21 years. The incident which led to this adverse action occurred on February 2, 1988, at approximately 9:25 a.m. That morning, while appellant's second level supervisor, Ms. Linda Banker, was in a meeting with her subordinate, Ms. Gwen Cephus (appellant's first level supervisor), she received a telephone call from Mr. Bruce Rinehart, an agency management employee. Mr. Rinehart told Ms. Banker that he was meeting in the conference room with an arbitrator and needed to see appellant. He gave Ms. Banker the conference room telephone number. After the call, Ms. Banker verified with Ms. Cephus that appellant was working in the blood bank that day and tried to telephone him there. The phone lines were busy. Ms. Cephus then decided to get appellant herself. (The blood bank window is across the hall from Ms. Banker's office.)

Shortly after being summoned by Ms. Cephus, appellant walked into Ms. Banker's office and stood in front

and to the left of her desk. Ms. Cephus had returned to Ms. Banker's office before appellant got there and was sitting in a chair beside Ms. Banker's desk. Ms. Banker told appellant that Mr. Rinehart called and that the arbitrator wanted to talk with him. She gave him the telephone extension number and asked whether he intended to call the arbitrator or go there in person.

The above facts are virtually undisputed by the parties except that appellant contends Ms. Banker could have reached him by phone because the lines in the blood bank were not busv. Moreover, he does not remember Ms. Cephus being in the room during his discussion with Ms. Banker. The first disputed fact is irrelevant to the issue. Appellant makes the claim because he feels that Ms. Banker wanted him to come to her office rather than tell him of Mr. Rinehart's request by phone in hopes of entrapping him into a confrontation. This is not an issue for the simple reason that, even if Ms. Banker had talked to appellant on the phone, he would still have been required to drop by her office to request official union time if he wanted to see the arbitrator. She thus had no reason to pretend the lines were busy. His failure to remember that Ms. Cephus was in the office at the time of the incident is not an unequivocal denial of her presence and is therefore of little probative weight in light of the testimony of Ms. Banker, Ms. Cephus, and another employee, Ms. Diane Cooper.

What happened once appellant was in Ms. Banker's office is hotly disputed. I will first relate Ms. Banker's version of the events. After Ms. Banker told appellant of his option to call the arbitrator or personally visit him, she asked him which course of action he intended to take.

Appellant reached over her desk to the telephone (located to Ms. Banker's left with the dial facing her), grabbed it, turned it around, brought it closer to him, and began pounding the keys to call the extension Ms. Banker had given him. He stayed on the phone for will over a minute. He began the conversation by identifying himself and stating that he could not get official union time approved for that day. During the conversation, he pulled up a chair and sat down. Because Ms. Banker was in the middle of a conference with Ms. Cephus to discuss an employee's performance evaluation, she asked appellant to continue his conversation on another extension because she needed the use of her office. Appellant responded by saying into the phone, "I've got to go. I'm being forced off the phone." Then after a moment he said, "The supervisor."

After he hung up the phone, he told Ms. Banker he wanted to go to the conference room. Ms. Banker reached behind her for the official union time log. She looked at her watch and asked appellant whether he agreed the time was 9:25. His response was, "I don't know what time it is." Ms. Banker then said, "Richard, you have a watch on your hand — what time does it say." Appellant answered, "9:23". Ms. Banker then said they would use her watch for the official sign-out time. She then asked appellant how much time he needed and the purpose for which he needed it. He said he did not know. Ms. Banker told him she would fill in "not designated" on the official log. Appellant said nothing. Next Ms. Banker asked if at least they could agree that the purpose was arbitration. Appellant said "no, he (the arbitrator) wants to talk to me." Ms. Banker then said that it was agreed that the pur-

pose was to talk to the arbitrator at his (the arbitrator's) request. She told him she would record the time he used after he returned to her office to sign in. Appellant pointed at the log and said he wanted time approved and would not sign it unless Ms. Banker approved it. Ms. Banker told him that she had approved the time but would fill in the amount used upon appellant's return from the meeting. Finally, she told appellant she needed her office to talk with Ms. Cephus. At that point, appellant coiled his arm back with his finger outstretched. He came toward Ms. Banker with his finger, then dropped his arm to the log which was on her desk and began pounding it with his finger. It was this gesture which caused Ms. Banker to believe that appellant might hit her. She picked up the log, held it to her chest, and told appellant that it was management's log and she had filled it out as she had been instructed to do. For the second time, she asked appellant to leave her office. He continued to stand before her desk, wave his arms around and said he needed to know if the time was approved. When Ms. Banker again said that she had approved the time, he responded by saying he still did not know whether it had been approved. Then he left. Ms. Banker described his voice as loud and confrontational.

After appellant walked out of Ms. Banker's office, Ms. Cephus got up and gently closed the door to the office. Moments afterward, Ms. Diane Cooper, who had been working in the office next to Ms. Banker's, opened the back door to Ms. Banker's office and said, "Is it safe to come in?" Ms. Banker asked Ms. Cooper what she had heard. Ms. Cooper responded that she heard appellant say, "I'm not leaving until I have my time approved." Ms.

Banker commented to Ms. Cephus, "I thought he was going to hit me." Ms. Cephus replied that she did not know what she would have done if that had happened. Appellant returned to Ms. Banker's office at 11:15 that morning to sign back in. The next day, Ms. Banker told Dr. Alexander, her supervisor, about the incident.

On February 5, 1988, Dr. Alexander wrote a memorandum to appellant asking him for his version of the incident. Tab 18 of Agency File. Appellant responded by writing on the memorandum, "What is the incident?" Dr. Alexander issued a letter of proposed removal February 16, 1988. The action became effective on March 18, 1988.

Ms. Cephus' testimony corroborated that of Ms. Banker. In addition, she testified that at no time during the incident did Ms. Banker raise her voice to appellant. Ms. Cooper, who was working on a computer next door, testified that she heard appellant "hollering and screaming." On the date of the incident, Ms. Cooper was chief steward of the professional unit.

Appellant's version of the events differs significantly from the versions testified to by Ms. Banker, Ms. Cephus, and Ms. Cooper. It is his position that he did not grab the telephone in a violent manner; that he specifically asked for 2 hours of official time; and that he was not loud or insubordinate. Next, he argues that the charge cannot be upheld because the agency did not prove that he made a threat against Ms. Banker which caused her to be in fear of bodily harm. Finally, appellant argues, in the alternative, that even if he did engage in the conduct described by Ms. Banker, his conduct constituted a protected activity

(union business) and thus he cannot be disciplined for it unless it is found to be so grossly insubordinate that it falls outside of that protection. I will address each of appellant's three arguments seriatim.

In an effort to establish that he did not engage in the charged conduct, appellant elicited the testimony of Ms. Vilveca Bryant and Ms. Mary Moore. Each testified she was in the area of Ms. Banker's office on the day in question and heard no loud noises. Moreover, as previously noted, appellant denied having engaged in the conduct described by Ms. Banker. The issue is essentially one of credibility.

In a recent opinion, *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-62 (1987), the Board set forth certain factors to be considered in evaluating a witness' credibility. Those factors include: (1) the witness' opportunity and capacity to observe the event or act in question; (2) the witness' character; (3) any prior inconsistent statement by the witness; (4) a witness' bias, or lack of bias; (5) the contradiction of the witness' version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness' version of events; and (7) the witness' demeanor.

Although I believe Ms. Bryant and Ms. Moore, their testimony is of little value in this case because they were unable to establish that their observations pertained to the incident at issue. Their testimony, therefore, does not withstand the first of the Hillen criteria.

Ms. Banker's office is located across the hall from the blood bank where appellant worked. The blood bank has a window, or counter, opening onto the hall. Ms. Bryant

works in the blood bank. It was her testimony that on the morning of the day in question she worked in the vicinity of the window because that is where the sink is located. At one point she looked through the window into Ms. Banker's office and saw appellant. She also saw his lips moving but could not hear what he was saying. Additionally, she saw Ms. Banker's hands on her desk. She did not recall seeing Ms. Cephus in the room. The thrust of her testimony was that appellant did not engage in rude or insubordinate conduct. I have no reason to believe that Ms. Bryant did not see appellant in Ms. Banker's office. The problem with her testimony is that she was uncertain of the time except that it was sometime in the morning. On cross-examination it was suggested to her that what she saw occurred at 11:15 when appellant returned to Ms. Banker's office to sign in. According to both Ms. Banker and appellant, when he returned to sign in, he sat down and talked with her for approximately 15 minutes. Although Ms. Bryant insisted that the scene she witnessed occurred earlier in the morning, she presented no evidence concerning how that one event on February 2, 1988, would have been so memorable to her. Appellant often went to Ms. Banker's office. Ms. Bryant could have observed him on any of those occasions. I therefore cannot view Ms. Bryant's testimony as being probative of appellant's conduct at 9:25 a.m. on February 2, 1988. The same is true for the testimony of Ms. Moore.

According to Ms. Moore, she was at the end of the hallway sometime between 9:00 and 9:30 waiting for a friend to join her to go on break. She saw appellant's profile as he was standing in Ms. Banker's doorway. His mouth was moving so she assumed he was talking to Ms.

Banker. His conduct, in her opinion, was not rude or insubordinate. She also testified that, when she walked by, she saw no one else in Ms. Banker's office. When asked on cross-examination how she could remember the exact time and date, she stated that it was because she recalled appellant telling her later that day that Dr. Alexander had asked him to explain his version of the events. The problem with her testimony is that Dr. Alexander did not even become aware of the incident until the day after it happened. Moreover, he did not mention it to appellant until he wrote a memorandum on February 5, 1988, asking appellant to tell his side of the story. Later in her cross-examination, Ms. Moore recanted her testimony and stated that she recalled the day because that morning appellant told her he was going to have to request official union time from Ms. Banker. Given these contradictory statements, I cannot conclude that Ms. Moore was certain of the day on which she saw appellant standing in Ms. Banker's doorway. Finally, I note that on the day of the incident, appellant did not stand in Ms. Banker's doorway but came into her office and stood in front of her desk. Even appellant never claimed that his conversation with Ms. Banker on the morning of February 2, 1988, took place while he was standing in the doorway. This is yet another reason why I discount Ms. Moore's testimony that what she saw occurred on February 2, 1988, at 9:25 a.m.

My credibility determination, therefore, must be predicated on whether I believe Ms. Banker's, Ms. Cephus', and Ms. Cooper's testimony over that of appellant. Although appellant testified that he did not recall Ms. Cephus' presence during his conversation with Ms. Banker, he at no time emphatically stated that she was not there.

Moreover, Ms. Cooper walked into the room just after appellant walked out and saw Ms. Cephus in the room. I therefore find that Ms. Cephus was in a position to have observed the incident. I also have no reason to disbelieve that Ms. Cooper heard portions of appellant's comments.

Since the character of the witnesses is not at issue here, the next relevant *Hillen* criterion is whether any of the three women or appellant made prior inconsistent statements. Based on my review of the record, including prior written statements of the witnesses and and their hearing testimony, I am unable to find any material inconsistencies.

The next point to be discussed involves the bias, or lack of bias, of the witnesses. It is true that Ms. Banker and Ms. Cephus are management employees and that appellant is a union official. Appellant has indicated throughout this case that management was out to "get him" because of his union activity. The question, then, becomes whether management, i.e., Ms. Banker and Ms. Cephus, are so prejudiced against appellant that they would make up the incident. I do not believe that to be the case. Even though they are considered a part of management, Ms. Banker, until 1986, was a union member. In fact, she was elected as Chief Steward in 1982 and served in that capacity until she was promoted into management. It is hard for me to accept that this transition into management would cause her to fabricate evidence against an employee with whom she worked for years in her union capacity. Indeed, there was testimony to the effect that when she was a union steward, Ms. Banker "drove a hard bargain" with management. Moreover, other than her managerial position, appellant has pointed to no personal an-

imosity between himself and Ms. Banker. As a matter of fact, he testified that he had come to Ms. Banker approximately a week earlier to complain about his treatment by another supervisor, Blanche Mitchell.

Ms. Cephus was appellant's first level supervisor. Again, appellant attributed a built-in bias on her part merely because her position was a managerial one. Apart from trying to raise that inference, he has attributed no personal animosity on her part against him.

As for Ms. Cooper, at the time of the incident she was a union steward. Several weeks after the incident, she was removed from her union position and appealed from that determination. According to appellant, the removal was not because she gave evidence against him but because some twenty union members filed a petition asking that she be removed from her union position because of her alleged preselection by management for a promotion. It is clear that there is currently some animosity between Ms. Cooper and the union. I do not believe, however, that she lied about overhearing the conversation of the morning of February 2, 1988, just to get even with the union. I make this finding because Ms. Cooper's testimony was very consistent with that of Ms. Banker and Ms. Cephus. This consistency is a check on her veracity. In any event, her testimony was not crucial to the case because even without it the agency had the testimony of Ms. Cephus who was in the room throughout the incident.

Appellant, of course, has a natural bias in this case because he is trying to save his job. But, that type of bias is inherent to any adverse action case and I therefore will not make a finding that he was untruthful because of it.

What I do find compelling, however, is that appellant did not unequivocally deny all aspects of the incident. He did not deny that he told the arbitrator over the telephone that he was being forced off the phone by his supervisor. He did not deny refusing to leave Ms. Banker's office until he was satisfied that the time was approved. Although he denies "grabbing" the telephone, he does not deny that he picked it up and started to dial the number Ms. Banker gave him without first answering her question. Also significant is the fact that appellant was not very happy about the arbitration to which he was called. In fact, he had previously tried to cancel it. He had been denied 8 hours of official time the day before because, according to management, he had not requested it sufficiently in advance. (He was told he would be granted only up to 4 hours.) He was unquestionably upset about that denial and viewed it as an attempt by management to thwart the union. While I will not say that he lied under oath, I do find that he perceived the events differently than did either Ms. Banker or Ms. Cephus. However, for the reasons I have set forth above, I find that they have less cause to slant their testimony than he. I therefore credit their testimony as being more objective concerning the events at issue.

The balance of the *Hillen* criteria are of little value to my credibility determination. I can only say that, since I find it unlikely for the reasons discussed above that Ms. Banker and Ms. Cephus would be biased in a manner which would cause them to give false evidence, I conclude, to the extent their testimony contradicts appellant's, it is more credible. In summary, I believe that ap-

pellant engaged in the conduct described by Ms. Banker and Ms. Cephus.

The next question to be resolved is whether that conduct rises to the level of rude, disrespectful, threatening, insolent, and insubordinate behavior. Appellant argues that the charge must fall because (1) insubordination contemplates refusal to carry out a supervisor's order; and (2) the agency failed to prove that Ms. Banker was in fear of bodily harm. In support of this last argument, appellant cites the case of *Metz v. Department of the Treasury*, 780 F.2d 1001, 1002 (Fed. Cir. 1986). That case is inapposite to the issues here. In *Metz*, the employee was removed for threatening to kill his superiors. Apparently, none of them believed he would carry out the threat and, for that reason, the court reversed the removal action. This case does not involve a charge of threatening to do bodily harm to a supervisor. Certainly, an employee who coils his arm and thrusts it toward another is acting in a threatening, or menacing, manner. In such a context, there is no need for a finding that someone was in fear of bodily harm. Ms. Banker testified that after appellant left, she told Ms. Cephus that she thought appellant was going to hit her. While she may not have continued to feel fearful when appellant returned to sign in, the fact remains that his gesture was a threatening one. In any event, it is clear that the agency did not level more than one charge against appellant. The word "threatening" is used together with a list of other adjectives to describe his conduct and does not constitute a separate charge. What the adjectives do constitute, as I will explain below, is a charge of insubordination. That one of the adjectives may not fit, does not alter the thrust of the charge.

With respect to appellant's insubordination, I find that Ms. Banker several times asked appellant to leave her office. He refused. That he may have complied eventually does not mean that he was not insubordinate. Indeed, his behavior in that regard constitutes a classic instance of refusal to follow a supervisor's order. In any event, the agency's table of penalties defines insubordination as "deliberate refusal to carry out any proper order from, *or* insolent, abusive or obscene language toward, immediate or other supervisor having responsibility for the work of the employee; willful resistance to same." Tab 91 of Agency File. In a similar case, *Cascio v. General Services Administration*, 21 M.S.P.R. 7, 9 (1984), the Board upheld a charge of insubordination when an employee abruptly left his supervisor's office during an oral counselling and, on another occasion, told his supervisor to "shut up" and made other discourteous remarks. In finding that this conduct constituted insubordination, the Board held that ". . . appellant's attitude, language and behavior may be characterized as disrespectful conduct which constitutes insubordination as defined in the agency's table of penalties." *Id.* at 9. In this case, the agency's table of penalties includes insolent, abusive, or obscene language. Indeed, that is the gravamen of the charge.

Everything that appellant did form the time he came into Ms. Banker's office can only be characterized as insubordinate. He refused to answer her questions, grabbed her telephone, thrust a coiled arm towards her, and refused to abide by her wish that he leave her office. And, he did all of this in a loud and confrontational manner. I

therefore find that appellant engaged in insubordinate conduct on February 2, 1988.

Appellant's Conduct on February 2 Was Not Protected

Appellant argues that even if he engaged in the conduct described in the advance notice, that conduct was protected and could not serve as the basis of an adverse action because, at the time of the incident, he was engaged in a union activity. *See* 5 U.S.C. § 7101 et seq. and *Romero v. Department of the Army*, 10 M.S.P.R. 56, 59 (1982), *aff'd* 708 F.2d 1561 (10th Cir. 1983). It is true that certain union-related activity is thus protected unless it constitutes gross insubordination. The problem with appellant's argument, however, is that the discussion he had with his supervisor does not come under the category of a protected union activity. In arriving at this conclusion, I have carefully read and reviewed all of the decisions cited by appellant. They are simply inapplicable to this case.

The Board has addressed the issue of what constitutes a protected union activity in only a handful of cases. In *Romero v. Department of the Army*, 10 M.S.P.R. at 59, the Board concluded that the appellant was not engaged in a union activity when he used abusive language towards his supervisor because, according to his own testimony, he met his supervisor to ask to see some records pertaining to union employees. In *Farris v. U.S. Postal Service*, 14 M.S.P.R. 568, 571, 574 (1983), the appellant made certain remarks to his supervisor and blocked the door to keep the supervisor from leaving the room. This conduct occurred during a grievance session. Even so, the Board concluded that it constituted gross insubordination and was thus beyond the scope of protected conduct. In

Kennedy v. Department of the Army, 22 M.S.P.R. 190, 194 (1984), the Board found the appellant's written comments to be protected because they were tendered as part of appellant's argument in a pending grievance. In the latter two cases, the conduct occurred in the context of a personal grievance. In the first, it did not and was found unprotected.

Appellant also cited a number of decisions issued by the Federal Labor Relations Authority (FLRA). Ironically, the first such case he cited, *Department of the Treasury IRS, Memphis Service Center*, 16 FLRA 687 (1984), supports a finding that appellant's conduct was not protected. In that case, a union representative approached a supervisor to discuss a pending grievance in which she was representing an employee and to seek official union time (referred to as "bank" time in the opinion.) The agency argued that the union representative was at the supervisor's desk solely for the purpose of requesting official time. The Administrative Law Judge found that the representative's behavior was protected because, in addition to seeking official time, she was there to discuss her client's problem. It was this latter purpose that caused the Judge to find the conduct protected. That decision causes me to believe that the mere seeking of official union time does not, of itself, constitute a protected activity.

In all of the other FLRA decisions, the conduct found to be protected occurred in the context of a specific grievance meeting or during the official pursuit of a grievance. When analyzed in the context of the plethora of FLRA decisions, appellant's claim cannot withstand scrutiny. In his post-hearing brief, appellant's counsel consistently refers to a grievance in which appellant was

involved. It is true that there was to be a grievance meeting in the conference room with management and an arbitrator. Had appellant's comments been made during that meeting, they might be considered to be protected activity. But they were not made in that meeting. Appellant made these comments to his second-level supervisor before he went to the meeting. He had no personal grievance pending against Ms. Banker nor was he in her office to discuss a specific grievance on behalf of another employee. Moreover, he has not established that she even know anything about the reason why the arbitrator wanted to see him. She was merely a conduit conveying a message to him. And, in order to excuse appellant from his duties so he could go to the meeting, Ms. Banker was required to see to it that he properly signed out. The request that he sign out can in no way be construed as a grievance meeting or a discussion of a grievance. The results would indeed be ludicrous if I were to find that every time an employee approached a supervisor to seek official union time, he was engaging in protected activity. Such a finding would mean that any employee who wanted to make insulting comments to his supervisor could simply walk into a supervisor's office, request official time, make whatever untoward comments he wanted to make, and then hide behind the protection of the "robust debate during a labor dispute" rule.

In making my finding that appellant's conduct was unprotected, I am mindful of the fact that the agency and the union have an ongoing dispute over the interpretation of an arbitrator's ruling concerning the number of hours of advance notice which must be given before an employee can be granted official time. However, I am also

aware of the fact that appellant was not in Ms. Banker's office to negotiate this dispute, officially or unofficially. He was there so that she could deliver a message to him. After delivering the message, she asked him if he wanted to sign out. He did and she granted him official time to go to the grievance meeting. I therefore reject appellant's argument and conclude that his conduct was in no way protected as union activity. Just because he is a union official does not mean, as he would want me to find, that each and every statement he makes to a supervisor is protected. Appellant was not before Ms. Banker as a representative in a grievance nor was she meeting with him as a designated management representative to hear any such grievance.

Appellant Did Not Prove That The Agency's Action Was Taken In Reprisal For His Union Activity

On appeal, appellant contends that the removal action was taken in reprisal for his union activities in violation of 5 U.S.C. § 2302(b)(9). If true, such conduct on the part of the agency constitutes a prohibited personnel practice and requires a reversal of the action.

To prove a claim of reprisal, an appellant must demonstrate that he engaged in an activity protected by statute, that he was subsequently subject to an adverse action by the agency, that the proposing and deciding officials had actual or constructive knowledge that the appellant was engaged in protected activity, and that there is a causal connection between the protected activity and the adverse action. *Ireland v. Department of Health and Human Services*, 34 M.S.P.R. 614 (1987); *Bodinus v. Department of the Treasury*, 7 M.S.P.R. at 541. To establish a

causal connection, the appellant must show that the retaliatory motive was a significant or substantial factor in the taking of the adverse action. *Gerlach v. Federal Trade Commission*, 9 M.S.P.R. 268, 274-76 (1981). If shown, the burden of going forward shifts to the agency to prove by preponderant evidence that it would have taken the same action even if the protected conduct had not occured. *Id.* at 275.

Prior to his removal, the appellant was the Vice President of the GS (General Schedule) Professional Unit at the facility where he worked. For many years he was also a chief steward of the union. During these years, appellant has filed numerous grievances and unfair labor practice complaints. Some were successful, other were not. There is no question that he engaged in protected activity during his employment. There is also no question that he was the subject of an adverse action and that both the proposing and deciding official know of his union activities. The critical issue is whether there exists a causal connection between the protected activity and the removal and, if so, whether the agency would have taken the action absent the protected activity.

As I have pointed out above, proof of a causal connection requires a showing that the retaliatory motive was a significant factor in the taking of the adverse action. Unfortunately for appellant, he has failed to establish this vital link. And, even had he done so, I conclude that the agency would have taken the action anyway given the nature of the sustained charge and appellant's prior disciplinary record.

Apart from the fact that he is a union official who was removed, appellant relies on numerous arguments in his effort tc show a causal connection. First, he contends that it was management's perception that he was using too much official union time. Second, he argues that he was treated differently than were other employees who engaged in similar conduct. Next he maintains that the agency's retaliatory motive was clear from the fact, that Ms. Banker drew him into her office in order to cause a confrontation. He also contends that there was much animosity between the agency and the union concerning the interpretation of an arbitrator's decision governing use of official union time. He further argues that the agency hired private counsel to pursue this case and refused " . . . to explain in discovery their [sic] need for private counsel", and that the agency undertook " . . . a tardy, expansive, and costly deposition of all of appellant's proposed witnesses." Appellant's Post-Hearing Brief at 38. Other claims of alleged reprisal made by appellant include the fact that the agency attempted to interview several of appellant's witnesses without notifying the union; that the agency did not call Mr. Bruce Rinehart or the deciding official as witnesses; and, that the agency never obtained a statement from the arbitrator to who he was speaking on the telephone while he was in Ms. Banker's office. Not one of these claims serves to establish a retaliatory motive.

Many of appellant's claims are frivolous in nature. An example is his claim that the agency hired private counsel and refused to explain why. True, appellant served interrogatories on the agency to determine why it had hired outside counsel and to ascertain the fee ar-

rangement. Because he set forth not one scintilla of evidence of conflict of interest or other compelling reason why the interrogatories should be answered, his motion to compel was denied. Moreover, that the agency deposed appellant's proposed witnesses only shows good, solid preparation for a hearing. Additionally, the agency asked its employees who were on appellant's proposed witness list if they would give voluntary and informal interviews. They refused; hence, the depositions. That the agency asked them to give such informal interviews is not improper nor is it evidence of bad faith.

Another example of appellant's shotgun attack is his claim that the agency did not call the deciding official or the arbitrator as witnesses. Appellant was just as free to call these individuals as was the agency. That they chose to rely on the testimony of the proposing official rather than the hospital director is by no stretch of the imagination evidence of a retaliatory motive.

Appellant's claim that management perceived he was devoting too much time to union activities simply has no basis in fact. There is certainly no evidence that such was the agency's perception. One of the agency's witnesses, Diane Cooper, did testify that when she was a union steward she was asked by other union members, including Vilveca Bryant, to talk to appellant about his usage of union time. The employees raised this concern because, according to Ms. Cooper, they felt that appellant was spending so much time on union activities he was leaving his duties for them to perform. This testimony, however, had nothing to do with management's perception of appellant's official time usage — only the perception of fellow employees. At this point I note that I left

the record open so that appellant could submit Ms. Bryant's statement concerning whether she had expressed her feeling to Ms. Cooper about appellant's official time usage. Appellant did not submit her statement but instead submitted the statements of two other employees. I am not considering their statements as part of the evidence in this case because the record was left open only for Ms. Bryant's statement.

Appellant's claim of disparate treatment due to his union activities cannot withstand the test of scrutiny. It must be remembered that this is appellant's third instance of insubordination. He first received a reprimand, then a 14-day suspension, and finally a removal. In the last 3 years, fifteen employees at the facility, excluding appellant, were disciplined for insubordination, disrespectful conduct, or abusive language. Exhibit I. The discipline ranged from reprimand to removal. It must be noted, however, that appellant is the only one who is being disciplined for the third time. Of those fifteen employees, three (excluding appellant) were union officials. They received admonishments for a first offense. Appellant has not established that any of these employees were similarly situated. There is therefore no evidence of disparate treatment. And, the fact that this is appellant's third instance of insubordination does not, of itself, establish a retaliatory motive. He has been a union official for at least the last 10 years of his more than 20 years of employment. I therefore cannot infer that the discipline he received was due solely to his union activities. In *Ireland v. Department of Health and Human Services*, 34 M.S.P.R. at 620-21, the appellant participated in organizing a union at his facility in February 1981. In July of the same year he

received his first unsatisfactory performance evaluation. The Board found evidence of reprisal because of the short time span between the onset of his union activities and his removal and because the agency could not prove most of its charges of unacceptable performance. In this case, there is no such proximity in time.

I have already addressed appellant's claim that Ms. Banker set up the meeting in her office in order to force a confrontation. That was simply not the case. Ms. Banker conveyed a message to him and asked him to advise her of his intended course of action. She in no way antagonized him or otherwise provoked his response. She had no way of knowing that appellant was upset about the arbitrator's visit and that he would vent his anger on her. He is the only one responsible for his conduct but, apparently, chooses to overlook that fact. Appellant views himself as cloaked in the veil of immunity because of his union position. That he was a union official does not mean every encounter with his supervisors constituted protected activity. Unfortunately for appellant, it is this erroneous perception that has caused him to be in his current predicament.

In summary, I can find no evidence in this record of a retaliatory motive. And, as I pointed out above, the charge has been sustained and constitutes appellant's third instance of insubordination. Thus, even if the agency did have a retaliatory motive, there is no question but that it would have taken the action anyway. Had it not done so, it would have been showing a level of favoritism towards appellant which is not condoned in the federal workplace.

Removal is A Reasonable Penalty In This Case

The thrust of appellant's challenge to the agency's penalty selection revolves around his argument that it improperly considered his past disciplinary record because a reprimand he received was the subject of a settlement before the FLRA and because his 14-day suspension is awaiting arbitration. His first argument is not factual.

On October 23, 1987, appellant received a written reprimand for insubordination and absence without approved leave (AWOL). Tab 79 of Agency File. He challenged the discipline by filing an unfair labor practice claim with the FLRA. During the processing of his claim, the parties entered into a settlement agreement. Under that settlement, the agency agreed to withdraw the AWOL charge and pay appellant for the 1 hour in dispute and appellant agreed to withdraw his claim. Tab 76 of Agency File. Nowhere in the agreement does it indicate that the agency was to withdraw the insubordination charge. I refuse to infer such a result given the clear language of the agreement. Indeed, on February 3, 1988, Dr. Alexander, the Chief of Laboratory Services, wrote a letter to appellant reminding him that he and his representative agreed during a meeting held on February 2, 1988, that the insubordination was not to be removed from his personnel records as a result of the settlement agreement. Tab 28 of Agency File. In fact, after the settlement agreement was entered into, appellant attempted to grieve the insubordination. Tab 28 of Agency File. Based on my limited review of that action, I cannot find that the repremand was clearly erroneous notwithstanding appellant's contention that the official time logs for that day are unclear. Accordingly, the agency properly considered the reprimand for

refusing a direct order of his supervisor. *Bolling v. Department of the Air Force*, 9 M.S.P.R. 335, 340 (1981).

The 14-day suspension is indeed pending arbitration. However, the Board has clearly and consistently held that an agency may rely on prior discipline even if it is the subject of a pending grievance. *Ballew v. Department of the Army*, 36 M.S.P.R. 400, 403 (1988); *Hubbard v. United States Postal Service*, 32 M.S.P.R. 505, 508 (1987). However, when prior discipline is the subject of a pending grievance, that fact constitutes a challenge to the action warranting a review of whether the action was clearly erroneous. *Ballew*, 36 M.S.P.R. at 403.

To determine whether a prior action was "clearly erroneous", it is incumbent on me to make a limited review of the discipline and ascertain whether I am left with the "definite and firm conviction that a mistake has been committed". *Bolling v. Department of the Air Force*, 9 M.S.P.R. at 340.

Appellant's 14-day suspension was predicated on two charges—insubordination and AWOL. The AWOL occurred on November 25, 1987. Appellant was given 2 hours of official union time at 1:35 p.m. His shift that day was to end at 4:00 p.m. However, after using the 2 hours, appellant did not report back to duty to complete his shift. He was charged with AWOL for 30 minutes. Tab 39-A of Agency File. The insubordination occurred on November 30, 1987. At 2:30 p.m. on that day appellant was ordered by Ms. Cephus perform a blood crossmatch for a bleeding patient. However, at 2:35 p.m., appellant made a telephone call. The call was to Mr. Bruce Rinehart, an employee in the personnel office. It was made because appel-

lant wanted to know where the union office was to be moved during construction at the facility. Tab 68 of Agency File. According to Mr. Rinehart, the call lasted between 5 and 10 minutes. While he was on the phone, Ms. Cephus received a call from the emergency room where the patient was bleeding internally. Ms. Cephus approached appellant and ordered him to get off the phone and begin the blood crossmatch for the patient. Appellant did not do so. Ultimately, the patient had to be given uncrossmatched blood. The patient died 6 days later. Tab 49-A of Agency File.

Appellant challenges the AWOL charge by contending that his official time was to commence at 2:00 p.m., not at 1:35 p.m. Tab 27 of Agency File. As for the insubordination, appellant maintains that at 2:20 p.m., he was discussing his performance evaluation with the chief Medical Technologist. She disputed his claim as to the time of their meeting. Tab 36 of Agency File. Appellant further claims that later, at 2:50 p.m., he began crossmatching the blood. His defense in that regard does not address why he did not begin the crossmatch as directed. Moreover, Mr. Rinehart submitted a statement that appellant called him at 2:35 p.m. and talked to him for 5 or 10 minutes. Given the statements of all the individuals involved in the incident, I am not left with the impression that the 14-day suspension was clearly erroneous. The agency properly considered it as an element of past record.

Dr. Alexander was the proposing official in this case. He testified that his recommendation to remove appellant was mainly predicated on the recurrent insubordinate behavior in which appellant engaged. He could see

no mitigating circumstances in this case. I agree. Appellant was clearly on notice that his insubordinate behavior would not be tolerated. Instead of taking heed, appellant elected to embark on a confrontational course vis-a-vis his supervisors. The agency's attempts at rehabilitation have failed.

Appellant's actions on February 2, 1988, demonstrate his egregious behavior and confrontational attitude. All he had to do was tell Ms. Banker whether he was going to call the arbitrator or visit him personally. Even if he did not know what to do, he could have easily told Ms. Banker that he would call the arbitrator, make his decision about his course of action, and return to her office to sign out. Instead he chose to make her office a battleground. His conduct is rendered even more egregious by the fact that Ms. Cephus, his immediate supervisor and Ms. Banker's subordinate, was in the room.

An agency need not tolerate acts of insubordination against its supervisors—especially in the presence of others. It matters not whether appellant is a union official or just another employee. As a Medical Technologist in the blood bank at the hospital, appellant shouldered no small amount of responsibility for patient care. It is intolerable for an employee in his position to spend as much time as he did engaging in confrontational behavior. His conduct was unjustified and, when coupled with his past record, sufficient to warrant the penalty of removal. I therefore find that removal was within the tolerable limits of reasonableness and that the action was taken for such cause as will promote the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/s/ Margaret S. Cunningham
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on August 19, 1988, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board

1120 Vermont Avenue, N.W., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.